Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

No. 96-1668

In The

Supreme Court of the United States

October Term, 1996

JAMES J. SHEEHAN,

Petitioner,

vs.

DAILY RACING FORM, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

DAMON E. DUNN, Esquire
Counsel of Record
LEVIN & FUNKHOUSER, LTD.
55 West Monroe Street
Xerox Centre – Suite 2410
Chicago, Illinois 60603
(312) 701-6800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court issue a Writ of Certiorari to reconsider the concurrent findings of fact by the District Court and the Court of Appeals, which findings resulted in summary judgment in favor of an employer based on a discharged employee's failure to submit sufficient evidence of a violation of the Age Discrimination In Employment Act, 29 U.S.C. § 621, et seq.?

RULE 29.1 LIST

Respondent Daily Racing Form, Inc. is a subsidiary of KIII Communications Corp. and has the following wholly owned subsidiaries: DRF Finance Inc. and Daily Racing Form of Canada, Ltd. Daily Racing Form, Inc. has no non-wholly owned subsidiaries of its own.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Daily Racing Form, Inc., respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Court of Appeals' unanimous opinion in this case. That opinion is reported at 104 F.3d 940 (7th Cir. 1997) (Posner, J.).

STATEMENT OF THE CASE

Petitioner James J. Sheehan's ("Sheehan") Statement of the Case incompletely described the facts presented to the District Court and the Court of Appeals which justified summary judgment for the employer in this case. The unanimous opinion affirming the judgment of the District Court carefully and thoroughly examined the entire record for material facts tending to demonstrate discriminatory conduct by the employer and found none.

The Court of Appeals could find no evidentiary basis in the record for Sheehan's age discrimination claim. The Court of Appeals noted that Sheehan relied on just two pieces of evidence to prove discrimination by the direct method, the "Shulman Memo" and a statistical analysis of the memo. (Petition Appendix ("Pet. App.") 2a-3a.) Yet Sheehan failed to introduce any supplementary evidence demonstrating that the listing of birth dates in the Shulman Memo actually constituted evidence of discrimination rather than a recital of one of several salient characteristics. Nor did the statistical analysis meet this Court's threshold requirements for admission into

evidence as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Moreover, Sheehan could not submit any indirect evidence that younger comparable employees were treated more favorably because the manager who was retained was both older and more capable than Sheehan. (Pet. App. 6a-7a.) Sheehan also did not submit evidence that he could perform the electronic pagination, writing and handicapping duties necessary to act as a Page Editor, let alone do it better than the individual transferred to that position. (Pet. App. 7a.)

Consequently, the "Questions Presented" as framed by Sheehan's Petition assume facts not supported by the record in this case and are merely designed to obscure Sheehan's purpose of asking this Court to review the factual record to determine whether the Court of Appeals properly affirmed on the basis of Sheehan's evidentiary failings.

In 1993, Daily Racing Form completed the revolutionary process of converting its publishing operations to electronic pagination and thereby completely changed the methods by which it published its newspapers over the last thirty years. (Pet. App. 10a-11a.) Entire job classifications were rendered redundant as the tasks either became totally irrelevant or were merged into other positions. For example, one "Page Editor" could use a personal computer to electronically perform the functions of the former data entry personnel, editors, copy editors, writers, statisticians and compositors and then transmit synchronized editions to remote print sites around the

nation. (*Id.*) As development of the new systems progressed, Daily Racing Form also determined that it could eliminate its Chicago Edition and merge those functions into its new bureau in Phoenix, Arizona. (Pet. App. 7a.) Consistent with the elimination of regional editions and manual layout, Daily Racing Form also eliminated the Turf Editor and Copy Editor positions and merged most of those functions into the new Page Editor position. (Pet. App. 10a-11a.) Of the two remaining Turf Editors in Chicago, John McEvoy was transferred to a new Assistant Editor position while McEvoy's younger assistant, Sheehan, was not retained.

Although Sheehan brought an ADEA claim, the only reference to Sheehan's age in the record appears in a memo written in December of 1992, by Chicago's General Manager, Stanley Shulman. Suspecting that electronic pagination would lead to staffing changes in Chicago, Shulman drew up the Schulman Memo to identify the subordinates which had proved valuable to him. He did not, however, share the memo with Editor Neil Cook, who ultimately was charged with making editorial staffing decisions after the decision was made to close Chicago in the summer of 1993. (Pet. App. 15a, 18a.) Nevertheless, the Shulman Memo is consistent with Cook's perception that Sheehan was the least versatile of the Turf Editors and underscores Sheehan's relative lack of versatility with respect to the unionized employees.

During the Summer of 1992, Daily Racing Form made an extensive effort to retrain its editorial staff, including Sheehan, to prepare for the introduction of electronic pagination. (Pet. App. 12a.) Cook directed the training and the trainers reported directly to him. (*Id.*) Sheehan

was trained with a small group for three weeks and trained again with a second group for three days. (*Id.*) The trainer who spent three weeks with Sheehan ranked him at the bottom of his group and found him unqualified for a Page Editor's position, while another trainer ranked him as third lowest out of four. (Pet. App. 13a.)

When Cook was informed in the late summer of 1993 that Daily Racing Form would close the Chicago Edition, he looked to redeploy his editorial assets consistent with the few openings available. (Pet. App. 15a-16a.) Cook created an Associate Editor position for McEvoy, who was older than Sheehan, to take advantage of McEvoy's writing skills. (Pet. App. 15a.) Cook believed, however, that Sheehan lacked writing and handicapping experience and that he had done poorly in training. Therefore, Cook did not offer Sheehan reassignment, in effect a demotion, to a nonsupervisory Page Editor position. (*Id.*)

REASONS FOR DENYING THE WRIT

Neither of the Questions Presented by the Petition satisfy this Court's criteria for granting a Writ of Certiorari, nor do they even demonstrate an error on the part of the Court of Appeals. *See* Supreme Court Rule 10. The Petition identifies no conflict with the decision of another United States court of appeals on the issues raised by the Questions Presented and no important question of federal law is implicated by this case.

Sheehan actually quarrels with the Court of Appeals' evaluation of the evidence in the record rather than the legal analysis employed. The Petition is entirely devoted

to citing conflicting interpretations of certain evidence presented in the case, despite both the District Court and the Court of Appeals having found this evidence to be irrelevant when placed in context. This Court, therefore, has no need to address the Questions Presented by Sheehan's Petition because the courts below found that there was no evidence of age discrimination.

Sheehan also suggests that the District Court and the Court of Appeals did not give due weight to the statistical analysis of the Shulman Memo or the Shulman Memo itself. Yet Sheehan does not cite any precedents of this Court, or any other court of appeals, which would require admission of this evidence, let alone hold that it would warrant reversal of a summary judgment.

Although the Petition appears to seek guidance on the application of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), formula in the ADEA context, it acknowledges that this Court emphasized that the formula should be applied pragmatically, if at all. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. ___, 134 L. Ed. 2d 433, 438 (1996). Both the District Court and the Court of Appeals explicitly referred to *O'Connor* in fashioning a *prima facie* test to fit the special circumstances of this case. Sheehan objects to the Court of Appeals' analogy to hiring cases, but offers no alternate formula which would have allowed him to survive a motion for summary judgment on this record. Given that none of Sheehan's Questions Presented are supported by the facts of this case or the law, and no conflict in the federal appellate courts exists, the Petition should be denied.

I. PETITIONER'S CLAIM WAS NOT SUPPORTED BY FACTS IN THE RECORD

Sheehan lost below for want of evidence, not because the Court of Appeals decided to enunciate a new legal principle. Critical elements necessary to establish discrimination simply lacked any factual support in the record. Indeed, the District Court's findings of fact received the concurrence of the Court of Appeals. This Court has explained that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). In sum, the Court of Appeals' decision was confined to the facts of this case and the record readily rebuts Sheehan's complaint that the Court of Appeals ignored the evidence. Consequently, the record in this case will not support the theoretical baggage that Sheehan seeks to append to it.

Although Sheehan emphasizes the Shulman Memo, the Court of Appeals deemed the references to employee birth dates in the Shulman Memo not to be probative for multiple reasons, any one of which would merit exclusion of the document. (Pet. App. 3a-4a.) The Court of Appeals initially noted that birth dates are salient characteristics. Even if the inclusion of birth dates in the biographical

data theoretically could suffice to evidence discrimination, however, the record demonstrates that Shulman preferred to retain Sheehan. (Pet. App. 4a.) Finally, the Schulman Memo cannot be linked to Cook's decision to discharge Sheehan because Cook never saw it. (Pet. App. 15a.)

In addition, Sheehan's statistical "breakdown" of the Shulman Memo randomly excludes persons from its data base and fails to account for numerous critical variables. (Pet. App. 18a-20a.) It also is based largely on statistics from departments other than Editorial, even though Cook had no real say with respect to these departments, which typically were consolidated or eliminated (for example, technology eliminated the need for both the Statistical and Composing departments). (Pet. App. 18a-20a.) Moreover, several employees had transferred *before* the decision was made to close the Chicago Edition and others later declined offers of reassignments to new and different jobs in other parts of the country. (Pet. App. 23a-24a.) When placed in this context, the Court of Appeals correctly found that the statistical analysis derived from the document was not probative of discrimination.

All of Sheehan's evidence concerning his qualifications was immaterial because it only concerned his performance of his former Assistant Turf Editor job, which had been eliminated. It is undisputed that both Shulman and McEvoy thought well of Sheehan but, since the Chicago Edition never utilized Electronic Pagination, neither of Sheehan's supervisors in Chicago had any experience with it. Although Sheehan also cites testimony by his former Chicago supervisors as evidence that he met expectations in his computer training, both men testified

that they had no first-hand knowledge regarding Sheehan's training. (Pet. App. 22a-23a.) In their thirty some years with the Daily Racing Form, neither McEvoy nor Sheehan had ever utilized a computer to publish the newspaper. (Pet. App. 2a, 23a.) Thus, although Sheehan's superiors found him to be a competent Assistant Turf Editor, they lacked any basis from which to evaluate his competence in an electronic environment and were completely unfamiliar with the duties of a Page Editor. (Pet. App. 23a.) Critically, there was no indication in the record that either Shulman or McEvoy told Cook that they believed that Sheehan could perform as a Page Editor. Instead, Shulman believed that it would take time for Sheehan to develop as a Page Editor. (Pet. App. 15a n.5.)

Nor did Sheehan establish that his qualifications were better than those of the employees Daily Racing Form retained and transferred. Ultimately, Cook transferred a Copy Editor with ten years of experience in the track and field division to Lexington as a Page Editor due to his unique experience. (Pet. App. 16a.) Cook reassigned another Copy Editor as a Field Correspondent/ Handicapper to Phoenix because Cook considered him to be one of the best writers and handicappers in the Chicago office. In addition, Cook transferred one employee from the Statistical Department to Phoenix as a Handicapper. Sheehan offered no evidence that he had any experience as either a writer or as a handicapper, or that he could have performed the duties of a Field Correspondent. Although McEvoy believed that Sheehan was a good layout man in the manual paste-up environment, he also testified that Sheehan had done very little writing and no handicapping of horses. (Pet. App. 7a, 23a.)

In sum, the Court of Appeals found that the factual assertions that are repeated in Sheehan's Petition were unsubstantiated in the record. What Sheehan really wants is for this Court to sift through the record to determine whether there was any factual foundation for a discrimination claim. It is not, however, the task of this Court to perform a factual review of a record already perused by the appellate court. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). The Court of Appeals already has examined the factual and legal underpinnings of Sheehan's claim of age discrimination and found them nonexistent.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Rule 10.1(a) of this Court lists, as the first "compelling" consideration for granting a writ, the rendering of " . . . a decision in conflict with the decision of another United States court of appeals on the same important matter." Sheehan does not contend that any federal appellate court has rendered a decision conflicting with the one at bar. The Court of Appeals itself gave no indication whatsoever that its ruling conflicted with that of any other circuit. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (where circuits "were really in harmony, and not in conflict," then "there was no ground for our allowing the writ of certiorari to add to an already burdened docket").

In particular, the Court of Appeals noted that Sheehan's allegations did not fit into the typical *McDonnell Douglas* paradigm because Sheehan's job was eliminated for reasons other than discrimination. Nevertheless, the Court of Appeals adapted the test by analogizing to hiring situations in order to afford Sheehan the added benefit of an indirect method of proof. (Pet. App. 6a.) Other circuits have employed similar variants of the "basic evidentiary framework set forth in *McDonnell Douglas*" in adapting *McDonnell Douglas* to new factual circumstances. *See, e.g., O'Connor,* 134 L. Ed. 2d at 438; *Rinehart v. City of Independence,* 35 F.3d 1263, 1265 (8th Cir. 1994); *Seman v. Coplay Cement Co.,* 26 F.3d 428, 432 n. 7 (3rd Cir. 1994); *Roush v. KFC Nat'l Mgt. Co.,* 10 F.3d 392, 396 (6th Cir. 1993); *Lindsey v. Prive Corp.,* 987 F.2d 324, 326 n. 5 (5th Cir. 1993); *Goldstein v. Manhattan Indus., Inc.,* 758 F.2d 1435, 1442 (11th Cir. 1985); *Haskell v. Kaman Corp.,* 743 F.2d 113, 119, and n. 1 (2d Cir. 1984); *Cuddy v. Carmen,* 694 F.2d 853, 856-857 (D.C. Cir. 1982); *Douglas v. Anderson,* 656 F.2d 528, 531-532 (9th Cir. 1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014-1016 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pa.,* 591 F.2d 58, 60-61 (10th Cir. 1979). That the Court of Appeals determined to employ a variant of the test in this case is consistent with the prevailing practice of the appellate courts.

The exclusion of the statistician's report also is consistent with this Court's standards as enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and the holdings other appellate courts rendered on closely analogous facts. *See, e.g., Hutson v. McDonnell Douglas Corp.,* 63 F.3d 771, 777 (8th Cir. 1995) (affirming summary judgment in an ADEA case where plaintiff's

statistical evidence failed to analyze treatment of comparable employees or control for most significant variables relied on by employer); *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 276 (4th Cir. 1995) (ADEA statistics must account for demographic information and job categories); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994) (same); *Palmer v. United States*, 794 F.2d 534, 539 (9th Cir. 1986) (affirming summary judgment for employer in ADEA case where sample of 15 was too small to have predictive value and must be disregarded).

Similarly, the Court of Appeals' determination that the listing of birth dates alone did not evidence discrimination is consistent with that of other courts of appeal. *See Armbruster v. Unisys Corp.*, 32 F.3d 768, 781 (3rd Cir. 1994); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991). Consequently, there is no need for this Court to intervene by granting the requested writ.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S ANALYSIS OF ALLEGED DISCRIMINATION CLAIMS

The Court of Appeals' analysis did not deviate from the analysis employed by this Court for the resolution of age discrimination cases. This Court found no need to address the applicability of the test to ADEA cases last term in *O'Connor*. In *O'Connor*, the Court applied the test after noting that "we have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it." 134 L. Ed. 2d at 438. In the

instant case, the Court of Appeals, as in *O'Connor*, proceeded to apply the *McDonnell Douglas* presumptions to the facts. Sheehan does not indicate that any appellate court has endorsed his suggestion that his Questions Presented warrant the attention of this Court. *See State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari).

Indeed, Sheehan's request for guidance on the applicability of *McDonnell Douglas* to this case presents only an abstract question. In *O'Connor*, this Court noted that it had not expressly ruled that the burden shifting method of proof should be available to ADEA plaintiffs. Notwithstanding this open question, both the District Court and the Court of Appeals gave Sheehan the benefit of the *McDonnell Douglas* presumptions after they determined that Sheehan lacked any direct or circumstantial evidence of age discrimination. Yet, even *with* the benefit of *McDonnell Douglas* framework of presumptions, Sheehan did not survive summary judgment. At best, *O'Connor* leaves open the question of whether Sheehan should have had the benefit of the *McDonnell Douglas* presumptions at all, an issue that would have absolutely no effect on the outcome of this case, given Sheehan's utter failure of proof under both the direct and indirect methods. To the extent that Sheehan poses a theoretical question not presented by this record, there is no occasion to decide it. *See Baltimore Radio Show, Inc.*, 338 U.S. at 918 ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari.).

The Court of Appeals easily saw through Sheehan's allegation as nothing more than speculation, holding that he had "presented no evidence that he was well suited for this demanding and specialized job." (Pet. App. 7a.) Ironically, Sheehan's Questions Presented seek to *"avoid* the *McDonnell Douglas* formula and proceed to trial under the direct method of proof" (emphasis added), apparently misapprehending that the *McDonnell Douglas* framework was developed to *assist* those plaintiffs, like Sheehan, who lack direct evidence. Avoiding the *McDonnell Douglas* framework would do Sheehan no good at all.

Contrary to the Petition's suggestion, the Court of Appeals conducted a thorough review of the record and concluded that Sheehan's evidence contradicted Sheehan's own theory of recovery. Sheehan appears to raise no question of law at all but to merely seek a redetermination of the facts. But see *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

CONCLUSION

For all of the reasons stated above, issuance of a writ of certiorari in this case would be improvident. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Furness, Withy & Co., Ltd. v. Yang-Tsze Ins.*

Assoc., Ltd., 242 U.S. 430 (1917). The Petition for Writ of Certiorari should be denied.

DAMON E. DUNN, Esquire
Counsel of Record
LEVIN & FUNKHOUSER, LTD.
55 West Monroe Street
Xerox Centre – Suite 2410
Chicago, Illinois 60603
(312) 701-6800

Attorneys for Respondent